

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KEVIN LEE FESSMAN
Claimant

VS.

K 15 AUTO SALVAGE, INC.
Respondent

AND

FIRSTCOMP INSURANCE COMPANY
Insurance Carrier

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Docket No. 1,026,207

ORDER

Claimant appealed the February 24, 2009, Award entered by Administrative Law Judge John D. Clark. Claimant was awarded benefits based upon a 10 percent loss of use of the left lower leg after the ALJ adopted the rating opinion of board certified orthopedic surgeon Pat D. Do, M.D., the court ordered independent medical examiner.

Jeff K. Cooper of Topeka, Kansas, appeared for claimant. Anton C. Andersen of Kansas City, Kansas, appeared for respondent and its insurance carrier.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on June 9, 2009.

ISSUES

This is a claim for a July 4, 2004, accident and resulting injury to claimant's left lower extremity. In the February 24, 2009, Award, Judge Clark adopted the functional impairment opinion of the court-ordered independent medical examiner, Pat D. Do, M.D., and granted claimant permanent disability benefits for a 10 percent functional impairment to the left lower extremity at the level of the lower leg. Claimant argues that the 10 percent functional impairment must, at the very least, be raised to a 13 percent functional impairment as Dr. Do modified his rating opinion during his deposition.

Claimant contends Judge Clark further erred in that the award of permanent disability benefits should be modified to award claimant an 8 percent functional impairment for the loss of use of the left leg and a 27 percent functional impairment for the loss of use of the left lower leg. Claimant requests the Board to modify the February 24, 2009, Award in this respect and to affirm the remainder of the Award.

Respondent requests the Board to affirm the Award.

The nature and extent of claimant's functional impairment is the only issue before the Board on this appeal.

FINDINGS OF FACT

Claimant was an employee for respondent, in auto sales, when, on July 4, 2004, he was helping remove debris from an out building damaged in a storm. As claimant was removing a piece of tin roof, it sliced into the top of claimant's left foot. Claimant was transported by ambulance to Via Christi-St. Francis Hospital where the wound was cleaned, sutured and dressed, and claimant was then released.

Claimant continued to have problems with the foot and sought treatment with Dr. Kent Heady on September 2, 2004. Claimant returned for followup on September 19 and September 23, 2004, and on October 7, 2004. Claimant had complaints of numbness of his great toe and spasms in his foot at night, causing his great toe on his left foot to draw up. Claimant was released from care with Dr. Heady on October 28, 2004.

Claimant continued to have problems and came under the care of Dr. Greg Horton, a foot specialist at the KU Medical Center in Kansas City, Kansas, with the first examination on May 10, 2005. Dr. Horton determined that claimant was a good candidate for surgery. On January 18, 2006, claimant underwent a left extensor hallucis longus tenolysis, secondary repair of chronic extensor hallucis longus partial tear trauma, and a transfer of the extensor hallucis brevis to augment reconstruction of the extensor hallucis longus. Claimant was on crutches for six weeks and in a CAM walker. Claimant's post-operative treatment continued through June 27, 2006, at which time he was placed at maximum medical improvement (MMI) and released. Board certified orthopedic surgeon Pat D. Do, M.D.'s medical report of March 6, 2008, indicates that Dr. Horton rated claimant at 12 percent, but does not specify at what level of the left leg.

Claimant was referred by his attorney to board certified orthopedic surgeon, Sergio Delgado, M.D., for an examination on January 25, 2007, and again on November 1, 2007. At the time of the initial examination, claimant's main complaints were to his left foot, but he also had some complaints related to his left knee, complaining of his knee buckling. Dr. Delgado recommended intensive physical therapy to aid in strengthening claimant's

quadriceps. Dr. Delgado opined the knee buckling was secondary to the quadriceps atrophy from the prolonged use of crutches. At the initial examination, the atrophy was measured at 3 cm. Range of motion of the great toe was limited due to possible scar tissue. There was significant sensory deficit involving the dorsum of the foot, but no evidence of stiffness with rotation at the mid foot region.

At the time of the second examination on November 1, 2007, claimant's atrophy of the left quadriceps had improved to 2 cm. The sensory deficit of the dorsum of the foot continued and was described as a complete loss of sensation at that level. Dr. Delgado now found significant limitation of the motion at the mid foot. Additionally, range of motion loss for both the great toe and the second toe were recorded. Based on the fourth edition of the *AMA Guides*,¹ claimant was rated at 8 percent to the lower extremity for the atrophy, 10 percent to the lower extremity for the loss of sensation on the dorsum of the left foot, 10 percent to the lower extremity or 14 percent to the foot for ankylosis of the left mid foot and 10 percent to the lower extremity for the loss of range of motion of the toes (which Dr. Delgado stated was not adequately rated under the *AMA Guides*), all of which combined for a 34 percent impairment to the left lower extremity, or a 14 percent impairment to the whole person.

Claimant was referred by the ALJ to Dr. Do for an independent medical evaluation (IME) on March 6, 2008. Dr. Do found claimant to have decreased sensation of the left foot medial plantar innervated foot to pinprick. The atrophy in claimant's quadriceps had improved to 1.6 cm. Claimant had a range of motion loss in the left great toe. Dr. Do rated claimant at 10 percent to the left lower leg, pursuant to the fourth edition of the *AMA Guides*.² However, during his deposition, Dr. Do noted that claimant had some nerve deficit which would account for an additional 5 percent to the lower leg. His overall rating was increased to 13 percent pursuant to the fourth edition of the *AMA Guides*.³ The ALJ adopted the opinion of the IME doctor, Dr. Do, in his report, by awarding claimant a 10 percent impairment to the left lower leg.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁴

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

² *AMA Guides* (4th ed.).

³ *AMA Guides* (4th ed.).

⁴ K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁶

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.⁷

The only issue raised to the Board involves the nature and extent of claimant's left lower extremity injury. The ALJ adopted the opinion of the IME doctor, Dr. Do, in awarding claimant a 10 percent impairment to the left lower extremity. Claimant contends the rating of Dr. Delgado is the more accurate opinion. However, the final examination by Dr. Delgado was on November 1, 2007. Claimant had displayed marked improvement between the two examinations by Dr. Delgado. The evaluation by Dr. Do was in March 2008, again with improvement displayed during the examination. The atrophy in claimant's quadriceps had improved, with an almost 50 percent improvement from the first evaluation by Dr. Delgado to the examination by Dr. Do. Additionally, Dr. Delgado noted range of motion limitations in two toes. Dr. Do only found limitations in the great toe, another indication that claimant had improved.

In evaluating the opinions of the testifying physicians, the Board finds the opinion of Dr. Do, the IME evaluating physician, to carry more weight. The Board affirms the ALJ's determination that Dr. Do's opinion was the most credible. However, the ALJ did not award claimant the full impairment determined by Dr. Do at his deposition. The Board will modify the award to grant claimant a 13 percent functional disability to the left lower leg.

Claimant argues that the ALJ erred in awarding only a single impairment to the extremity instead of awarding an impairment to each level of the extremity. However, the

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁶ K.S.A. 44-501(a).

⁷ K.S.A. 44-510e(a).

Kansas Court of Appeals, in *Mitchell*,⁸ ruled that when dealing with multiple injuries to an extremity, the compensation to the extremity is to be at the highest level affected, regardless of whether the loss is total or partial. Claimant's request to separate the extremity ratings to the different levels of the lower extremity is denied.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to grant claimant a 13 percent functional disability to the left lower leg, but otherwise affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated February 24, 2009, should be, and is hereby, modified to award claimant a 13 percent functional disability to the left lower leg, but is otherwise affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Kevin Lee Fessman, and against the respondent, K 15 Auto Salvage, Inc., and its insurance carrier, Firstcomp Insurance Company, for an accidental injury which occurred on July 4, 2004, and based upon an average weekly wage which qualifies claimant for the maximum weekly benefit of \$449.00, for 24.7 weeks permanent partial disability compensation at the rate of \$449.00 per week or \$11,090.30, for a 13 percent permanent partial disability to the left lower leg.

As of the date of this award, the entire amount would be due and owing and ordered paid in one lump sum, minus any amounts already paid.

The record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.⁹

⁸ *Mitchell v. Petsmart, Inc.*, ___ Kan. App. 2d ___, 203 P.3d 76 (2009).

⁹ K.S.A. 44-536(b).

IT IS SO ORDERED.

Dated this ____ day of June, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
 Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
 John D. Clark, Administrative Law Judge